BALANCED BUDGET AMENDMENT/Congress Decides Court Jurisdiction

SUBJECT: **A Resolution Proposing a Balanced Budget Amendment to the Constitution of the United States . . . H.J. Res. 1. Dole motion to table the Johnston modified amendment No. 272.**

ACTION: MOTION TO TABLE AGREED TO, 52-47

SYNOPSIS: Pertinent votes on this legislation include Nos. 62-63, 65-70, and 72-98.

As passed by the House, H.J. Res. 1, a resolution proposing a Balanced Budget Amendment to the Constitution, is virtually identical to the balanced budget constitutional amendment that was considered last year by the Senate (see 103d Congress, second session, vote Nos. 47-48). The resolution: will require a three-fifths majority vote of both Houses of Congress to deficit spend or to increase the public debt limit; will require the President's annual proposed budget submission to be in balance; and will require a majority of the whole number of each House to approve any bill to increase revenue. Congress will be allowed to waive these requirements for any fiscal year in which a declaration of war is in effect. Congress will enforce and implement this amendment by appropriate legislation. The amendment will take effect in fiscal year 2002 or with the second fiscal year beginning after its ratification, whichever is later. The States will have 7 years to ratify the amendment.

The Johnston modified amendment would add the following at the end of section 6: "The judicial power of the United States shall not extend to any case or controversy arising under this article except for section 2 thereof, or as may be specifically authorized in implementing legislation pursuant to this section."

Debate was limited by unanimous consent. Following debate, Senator Dole moved to table the Johnston amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

Those favoring the motion to table contended:

Proponents of this amendment desire an ironclad guarantee that under no circumstances will it be possible to have a court enforce this balanced budget amendment. Their fear is that the courts will interfere in the budget process in the course of enforcement. Such

(See other side)

YEAS (52)

Republicans (43 or 83%)		Democrats (9 or 19%)
Abraham	Helms	Campbell
Ashcroft	Inhofe	Graham
Bennett	Kempthorne	Harkin
Burns	Kyl	Heflin
Chafee	Lott	Kohl
Coats	Lugar	Moseley-Braun
Cochran	Mack	Reid
Cohen	McCain	Robb
Coverdell	McConnell	Simon
Craig	Murkowski	
D'Amato	Nickles	
Dole	Packwood	
Domenici	Pressler	
Faircloth	Santorum	
Frist	Shelby	
Gramm	Simpson	
Grams	Smith	
Grassley	Snowe	
Gregg	Thomas	
Hatch	Thompson	
Hatfield	Thurmond	
	Warner	

NAYS (47)

Republicans (9 or 17%)	Democrats (38 or 81%)	
Bond	Akaka	Hollings
Brown	Baucus	Inouye
DeWine	Biden	Johnston
Gorton	Bingaman	Kennedy
Hutchison	Boxer	Kerrey
Jeffords	Bradley	Kerry
Roth	Breaux	Lautenberg
Specter	Bryan	Leahy
Stevens	Bumpers	Levin
	Byrd	Lieberman
	Conrad	Mikulski
	Daschle	Moynihan
	Dodd	Murray
	Dorgan	Nunn
	Exon	Pell
	Feingold	Pryor
	Feinstein	Rockefeller
	Ford	Sarbanes
	Glenn	Wellstone

NOT VOTING (1)

Republicans (1)	Democrats (0)
Kassebaum-[2]	

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

a guarantee is not in this resolution, and with good cause. We do not mean that we favor judicial enforcement, or that we expect that judicial enforcement will even be likely in our lifetimes. The Constitution, statutory authority, and precedent give strong and redundant guarantees against judicial overreaching. The balanced budget amendment itself will specifically give Congress enforcement authority. However, we concede that some bizarre case may arise in which standing to sue will exist. As a matter of principle, we do not think that we should pass the Johnston amendment, which would essentially amend the due process clause for the first time by making it possible to block totally an injured party's right to judicial redress. As a practical matter, we do not believe the Johnston amendment would affect the operation of the balanced budget amendment, but it would certainly affect the favor in which some Senators hold it. Thus, both as a matter of principle and as a practical matter, the Johnston amendment should be defeated.

In our court system, a litigant must always meet a minimum of three requirements to gain standing: first, a concrete and particularized injury must be demonstrated; second, that injury must be traceable to particular unlawful conduct; and third, the injury must be redressable by the courts. We find it to be vastly improbable that any individual will be able to show a particularized grievance. Certainly all citizens may find that they have generalized grievances from tax and spending changes, but such grievances do not constitute harm from unlawful conduct.

Even if particularized harm that was traceable to unlawful conduct were somehow demonstrated, we do not see how the requirement of redressability could then be met. To provide redress for a tax and spending decision, a court would need the power to change that decision. No court has that power. Courts are constitutionally required to defer to executive and legislative branch budget decisions because those decisions are "political questions," which are outside of their purview. More broadly, political questions cannot be decided by the courts without violating the separation of powers doctrine.

Some Senators are fearful that the traditional judicial respect for the constitutional role of the legislature is diminishing. As evidence they cite the 1990 *Missouri* v. *Jenkins* case in which the Supreme Court upheld the right of a Federal court to order a local school district to levy taxes to pay for a desegregation plan. We were appalled by that decision, but we point out that it was based on section 1 of the 14th amendment, from which the judiciary derives its power to rule against the States on equal protection claims. This case, therefore, has no bearing on the Federal Government. We do not know of any instance in which a Federal court has attempted to make budgetary decisions for Congress. Additionally, we point out that all States but one have balanced budget amendment constitutional requirements, and that the State courts in these States have not used those requirements to take over the budget process.

All of these facts notwithstanding, some Senators still fear that renegade judges will ignore the Constitution and precedent by using the balanced budget amendment to thrust their way into political questions. These fears are baseless, but even if they were not we note that Congress is well equipped to defend itself. Article III of the Constitution gives Congress the authority to limit the jurisdiction of the courts and the type of remedies they may apply. Congress has often exercised that authority. Additionally, section 6 of this balanced budget amendment will give Congress the duty of enforcing and implementing this amendment. Clearly, Congress will be able to stop renegade judges.

When we have pointed out Congress' authority to limit judicial involvement, some Senators have then countered that it may have difficulty exercising that right. They correctly point out that passing the Johnston amendment's constitutional prohibition on any court remedy unless specifically authorized by Congress would provide an absolute, unambiguous protection. Congress could then delineate the parameters for judicial involvement to take care of any claims that might arise. The argument is initially compelling, but we must reject it for two reasons. First, on constitutional grounds, it could result in due process being denied to individuals with legitimate claims. Though we have extreme doubts that any such cases will ever arise, if they do, the Constitution should not contain a bar on judicial relief unless Congress has previously decided by statute that it may be provided. Second, if such a bar were placed in the Constitution, Congress would be less diligent in examining the proper role of the judiciary in the implementation of this amendment, because the debate would begin from a totally unambiguous point. Those Senators who are against any judicial role would not be in a rush to debate it. Congress might well avoid its responsibility to debate and decide such issues as standing and whether to limit relief to declaratory judgments.

Passing the Johnston amendment would also hurt the chances of passing H.J. Res. 1. A few Senators who support its passage do not want to limit judicial remedies, while a few other Senators who support it are very desirous of keeping the courts entirely out of the process. Each Senator believes that the amendment, as drafted, supports his or her respective position. The majority of this resolution's supporters, and we suspect as well the majority of its opponents, are fully convinced that the courts will only be involved in the most anomalous of situations, and that then they will keep their involvement narrowly focused so as not to interfere in the budgetary process. Thus, as drafted, supporters of the balanced budget amendment have different opinions over the extent to which it allows judicial involvement, and they are each satisfied that the current language supports their individual positions. If the language were changed so as to make abundantly clear the falsity of one of these positions, then votes would be lost. As close as this vote is likely to be, we cannot afford to lose any votes.

Some Senators have not looked with favor on this failure to state with specificity the degree of judicial coverage there will be of this constitutional amendment. They seem to feel that there is a hope to disguise the operation of the amendment sufficiently to pass it by attracting enough votes of Senators who would otherwise vote against it. However, none of us who supports H.J. Res. 1

is being deceptive; each of us finds the language to be clear. None of us is compromising on principle.

The same may not be true of some supporters of the Johnston amendment. As the amendment was first presented, it unambiguously denied any court jurisdiction without express statutory authority. As modified, it would deny that jurisdiction for every section except section 2. This modification gives the appearance of encouraging judicial activism for section 2, which not even the underlying text does. This modification may attract a few more votes, but it does appear to be inconsistent with the original intent of the Johnston amendment.

We are no friends of judicial activism. Policies should be set by elected legislatures, not unelected judges. As we have explained, though, our colleagues' fears are unwarranted. We intend to vote to table this amendment, but, once the balanced budget amendment is passed, we also pledge to work closely with our colleagues on statutory language to make absolutely certain that their fears have no basis.

Those opposing the motion to table contended:

Our position is that the Congress, and the President with his veto authority, alone should have the power to set tax and spending policies. Tax and spending policies are issues that are absolutely outside the purview of the courts. Any jurisdiction that the courts have they should have solely at the sufferance of Congress. Certainly, as our colleagues have cogently argued, constitutional and customary protections exist. Frankly, if we were to describe how courts "ought" to treat such issues as separation of powers, political questions, and standing, we would give exactly the same description as opponents of this amendment have offered. For most of this Nation's history, that description not only described how things ought to be, it also described how things actually were. Distressingly, though, in recent years a gradual gulf has grown between how things are and how things ought to be.

Activist judges will very likely exploit the balanced budget amendment, if it is ratified, to impose their policy preferences. Though our colleagues would like to believe that judges will never impose tax hikes, we point to the case of *Missouri* v. *Jenkins*, in which the Supreme Court upheld the right of a Federal district court to order a local school jurisdiction to raise taxes. Granted, the court found its excuse for usurping this legislative authority under the equal protection clause of the 14th amendment, which only applies to the States, but we find cold comfort in this fact. If the Supreme Court is willing to read the Constitution creatively to usurp this most basic legislative function when dealing with the States, we do not doubt that it may be equally willing to find some justification in another part of the Constitution for treating the Federal Government similarly.

We also find much to fear when we look at how State courts have treated State balanced budget requirements. In 1977, in New York, the court took jurisdiction in ruling on the permissibility of a loan during a fiscal crisis; in 1981, in Illinois, the courts took jurisdiction to rule on whether it was permissible for the State to close schools early as part of an effort to bring the budget into balance; in Wisconsin, the courts took jurisdiction to determine if a lease-purchase agreement were permissible; in Georgia, the courts took jurisdiction to determine if a lease by a development authority constituted indebtedness; in California, the courts took jurisdiction to determine if that State's balanced budget amendment permitted the State to suspend funding to the State employees' retirement system. In sum, States have passed balanced budget amendments to their constitutions, and the courts have used those amendments to interfere in revenue and spending decisions.

Our colleagues assurances that the courts will not become involved in tax and spending decisions under this amendment would carry more weight with us if they could bring forth at least one constitutional expert who supports their position. However, no expert is willing to state, categorically, that the courts will not have any jurisdiction under this amendment unless Congress expressly permits it. In fact, most experts, both liberal and conservative, foresee extensive court intrusion. On the extreme left we have Harvard Law Professor Lawrence Tribe, who said that, "Members of Congress, a House of Congress, someone who has been cut off from a program, a taxpayer--these people will be able to go to court. No question about it." Speaking from a conservative standpoint, former Solicitor General Judge Robert Bork concurs, writing that the adoption of a balanced budget amendment would result in "hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results." Not all experts expect a limitless right to sue, but they still expect an extensive number of suits. For example, current Assistant Attorney General Walter Dellinger concedes that taxpayers and members of Congress may not be granted standing, but that others with more specific injury will not be denied. For instance, a criminal defendant who is ordered to pay a greater fine in accordance with a new criminal statute may sue on the grounds that the greater fine "increased revenues" within the meaning of section 4 of the balanced budget amendment. In such a case, an activist court could undo congressional efforts to fight crime. Even former Attorney General Barr, whom our colleagues cite as supporting the language of this amendment, has stated for the record that he would prefer a modification to limit judicial review to actions for declaratory judgments.

Last year our colleagues accepted a Danforth amendment by voice vote which was essentially the same as the Johnston amendment. The sole difference is that the Danforth amendment limited the courts to declaratory relief. That amendment was agreed to in order to garner more votes. This year, our colleagues seem certain that adding any limits on court jurisdiction will lose more votes than will be gained. Our head count indicates otherwise. We know of at least a couple of Senators who intend to vote for the balanced budget amendment only if the Johnston amendment is accepted.

Frankly, we know that most Senators are deeply desirous of keeping the courts out of tax and spending decisions. Elected

representatives, who can make decisions quickly and who can be held accountable by the voters, should make these most basic decisions. Unelected judges should not be permitted to manage public policy through lengthy, sporadic court cases. If we do not place the Johnston amendment directly into the Constitution, we will have no assurance of judicial restraint. Therefore, we urge all Senators to oppose this motion to table.